(1)

95-1338

No. _____

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

BERNARD K. TSE, LAWRENCE D. LUMMIS, ROBERT C. WILSON, PHILLIP E. WHITE, JAMES P. LALLY, and WYSE TECHNOLOGY, INC.,

Petitioners,

v.

RICHARD T. SCHWARZSCHILD, On Behalf of Himself and All Others Similarly Situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN M. SCHATZ
Counsel of Record
TERRY T. JOHNSON
PETER P. CHEN
IRWIN R. GROSS
MICHAEL B. LEVIN
WILSON, SONSINI, GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304
(415) 493-9300

Counsel for Petitioners

February 20, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

61 pp

QUESTION PRESENTED

After a plaintiff class has been certified under Fed. R. Civ. P. 23(b)(3), may a court refuse to allow distribution of Rule 23(c)(2) notice to absent class members, on the ground that defendants "waived" such notice by failing to request it prior to making a motion for summary judgment?

DISCLOSURE PURSUANT TO RULE 29.1

Petitioner Wyse Technology, Inc. has no parents and no subsidiaries other than wholly-owned subsidiaries. The remaining petitioners are individuals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RULES OF CIVIL PROCEDURE INVOLVED	1
STATEMENT OF THE CASE	2
1. Proceedings in the District Court	2
2. Proceedings in the Court of Appeals	3
REASONS FOR GRANTING THE WRIT	7
I. The Decision Below Directly Conflicts with the Plain Language of Rule 23	8
II. The Decision Below Squarely Contravenes This Court's Decision in *Eisen*	11
III. The Decision Below Creates a Conflict Among the Circuits	13
IV. The Decision Below is Directly At Odds with the Public Policies Served By Class Notice	15
CONCLUSION	19

TABLE OF AUTHORITIES

Page(s)

CASES

Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989) 10

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) 12, 15, 17

Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd., 650 F.2d 633 (5th Cir. 1981) 10

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 3

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) ..... *passim*

Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974) 6, 13, 14

Postow v. OBA Federal Savings and Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980) 6, 13, 14

United Airlines, Inc v. McDonald, 432 U.S. 385 (1977) 12, 13

United States v. Indrelunas, 411 U.S. 216 (1973) 10

RULES

Fed. R. Civ. P. 23 ..... 1, 8, 9, 10, 11, 15, 16

Fed. R. Civ. P. 23(b)(3) 2, 7, 8, 9, 13, 15

Fed. R. Civ. P. 23(c)(2) ..... *passim*

Fed. R. Civ. P. 23(c)(3) 9

Fed. R. Civ. P. 58 10

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

15 U.S.C. §§ 78m(e), 78n(e) (1988) 2

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

Advisory Committee's Notes to Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69 (1966) 9

"Federal Class Action Statistics," 16 Class Action Rep. 605 (1993) 7

Manual for Complex Litigation, Third § 30.21 (1995) 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the district court's order directing the distribution of class notice, is reported at 69 F.3d 293, and is reprinted as Appendix A, at page A1.[1] The memorandum decision and order of the United States District Court for the Northern District of California, from which appeal was taken, is reprinted as Appendix B, at page A6.

JURISDICTION

The Court of Appeals issued its opinion on June 22, 1995 and amended that opinion on October 24, 1995. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 20, 1995. *See* Appendix C, at page A18. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES OF CIVIL PROCEDURE INVOLVED

This case involves the interpretation of Rule 23 of the Federal Rules of Civil Procedure. The full text of Rule 23 is set forth as Appendix D, at page A19, and the rule provides in relevant part:

---

[1] References to the appendices bound with this Petition are styled "A___".

Rule 23. Class Actions

. . .

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

. . .

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

STATEMENT OF THE CASE

1. Proceedings in the District Court

Following a takeover of defendant-petitioner Wyse Technology, Inc.,[2] plaintiff-respondent Richard Schwarzschild filed this action in January 1990, alleging violations of Sections 13(e) and 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78m(e), 78n(e) (1988), as well as various state law causes of action.

In July 1991, Schwarzschild moved for class certification under Fed. R. Civ. P. 23(b)(3). The district court certified the plaintiff class in October 1991, and denied Wyse's motion to reconsider class certification in July 1992. On October 9, 1992 – the court-ordered deadline for

[2] Petitioners are referred to herein collectively as "Wyse".

filing dispositive motions – Wyse moved for summary judgment. At the same time, Schwarzschild filed a motion seeking approval of his proposed form of class notice. Shortly thereafter, Wyse submitted a response, agreeing that the court should order class notice, but requesting certain changes in the form of that notice.

On December 9, 1992, the district court entered an order granting Wyse's motion for summary judgment. The court did not rule on the pending motion to approve the form of notice to the certified class, nor did the court enter final judgment. In May 1993, after six months during which Schwarzschild failed to satisfy his obligation to provide notice to absent class members, Wyse moved for an order requiring that class notice be distributed. On July 6, 1993, pursuant to Fed. R. Civ. P. 23(c)(2), the district court ordered Schwarzschild to send class notice. (A3).[3]

2. Proceedings in the Court of Appeals

On appeal, a divided panel of the Ninth Circuit, consisting of Judges Reinhardt and Fletcher as well as Judge Noonan in dissent, reversed the district court's order directing distribution of notice.[4] The panel recognized the mandatory nature of Rule 23(c)(2), which

---

[3] The district court subsequently entered an order specifying the form of notice to be sent to absent class members. A copy of this order is reprinted as Appendix E, at page A23.

[4] Although there has been no final judgment, a motions panel of the Ninth Circuit ruled that the district court's order directing the distribution of notice is an appealable order. *See, e.g., Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169-72 (1974)

requires that "the court shall direct to the members of the class the best notice practicable under the circumstances." But writing for the two-judge majority, Judge Reinhardt ruled that "[b]y obtaining summary judgment before notice had been sent to the class, the defendants *waived* their right to have such notice given and to obtain a judgment that was binding upon the class." (A14) (emphasis added). In reaching this holding, Judge Reinhardt offered three rationales.

First, Judge Reinhardt assumed that the principal purpose of Rule 23(c)(2) is to confer a benefit on defendants by preventing plaintiff class members from intervening in a class action following a final judgment in plaintiffs' favor. From this premise, the majority concluded that, if defendants wish to exercise their "right" to class notice, they must do so prior to moving for summary judgment or face "waiver" of that "right" – even though it is plaintiffs who are required to distribute class notice and neither Rule 23(c)(2) nor the applicable caselaw expressly permits defendants to compel plaintiffs to do so. Applying the majority's rationale that class notice is defendants' "right," Judge Reinhardt held that Rule 23(c)(2) simply does not apply if the court grants summary judgment for defendants prior to the distribution of notice. (A10-14).[5]

(holding that an order regarding class notification procedures is appealable under the collateral order rule). A copy of the motions panel's order is reprinted as Appendix F, at page A34.

[5] Without expressly ruling on the issue – and without suggesting any possible supporting rationale – the majority intimated that notice may be appropriate following a district court's grant of summary judgment in *plaintiffs'* favor. (A13 n.4).

Second, the majority noted that Rule 23(c)(2) applies only to class actions which are "maintained" before the district court. Although the district court had not entered final judgment at the time it ordered distribution of class notice, the majority nevertheless suggested that, because the district court had entered an order granting a summary judgment motion, the case was no longer being "maintained" as a class action. (A10).

Finally, the panel's decision purported to rely on rulings from the Third and D.C. Circuits which suggest that a defendant may waive class notice if the defendant seeks summary judgment *before a class is certified*. Although neither of these cases involved a defendant who, like Wyse, moved for summary judgment *after* class certification but before distribution of class notice, Judge Reinhardt nevertheless relied upon those opinions in holding that "when defendants obtain summary judgment before the class has been properly certified *or before notice has been sent*, they effectively waive their right to have notice circulated to the class under Rule 23(c)(2)." (A14) (emphasis added).

In a pointed dissent, Judge Noonan rejected each of the proffered rationales for the majority's freshly-minted "waiver" theory and noted that the theory conflicts not only with the text of Rule 23(c)(2) but also with this Court's precedents as well as the decisions of the two other circuits upon which the majority purported to rely.

As the dissent correctly recognized, under this Court's ruling in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the "right" to notice belongs to the plaintiff class, not to defendants. With this right comes the duty –

imposed upon plaintiff class representatives – to distribute class notice. The majority's ruling, however, erroneously "transforms this duty to the class into a right of the defendant to have such notice sent." (A15). Therefore, Judge Noonan concluded that the majority's "puzzling" waiver theory "is unsupported by Rule 23(c)(2), which . . . does not mention any right of the opposing party to have notice sent." (A15). Under Rule 23(c)(2), as properly read, Wyse could not possibly have "waived" the notice rights of the plaintiff class.

The dissent also rejected the majority's contention that Rule 23(c)(2) does not apply simply because the district court entered an order granting a motion for summary judgment on behalf of defendants. "In the instant case, no final judgment has been entered by the district court. The case is therefore still being maintained." (A15). The dissent thus properly reasoned that Rule 23(c)(2) notice following an order granting a motion for summary judgment serves precisely the same function that class notice serves in any case, "to inform potential class members that the judgment, whether favorable or not, will include all members who do not request exclusion." (A16) (internal quotations omitted).

Finally, the dissent concluded that the panel's "novel waiver theory" is "inconsistent with the two cases as to which it says that it is in harmony." (A16). In particular, the dissent found that the majority's theory of "waiver" is inconsistent with the decisions in both *Postow v. OBA Federal Savings and Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980) and *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974) (*en banc*), *cert. denied*, 419 U.S. 885 (1974).

REASONS FOR GRANTING THE WRIT

Once certification is granted, the issue of notice necessarily arises in each Rule 23(b)(3) class action. Thousands of such actions presently are pending before federal courts,[6] and thousands more undoubtedly will be filed in the future. The Ninth Circuit's unprecedented "waiver" theory, however, ignores both Rule 23(c)(2)'s explicit language mandating distribution of notice in 23(b)(3) class actions as well as this Court's express instruction in *Eisen* that class notice may *not* be waived. Accordingly, unless corrected, the decision below will lead to erroneous failures to distribute notice to certified classes in a substantial number of future cases arising in the Ninth Circuit.

Still worse, the Ninth Circuit's opinion shatters nearly two decades of consensus among the lower courts concerning the mandatory nature of individual notice in Rule 23(b)(3) class actions. Creating a conflict between the Ninth Circuit and the Third and D.C. Circuits, the "waiver" theory espoused by the opinion below will result in confusion concerning Rule 23(c)(2) notice throughout the federal judicial system. Unless the decision below is corrected, absent class plaintiffs will not be certain to receive required notification, and defendants will no longer be able effectively to seek early resolution of class claims on summary judgment. The erroneous decision below therefore will have a far-reaching and

---

[6] *See* "Federal Class Action Statistics," 16 Class Action Rep. 605 (1993).

adverse impact on hundreds (perhaps thousands) of future Rule 23(b)(3) class action cases.

This case is an ideal vehicle for addressing the Rule 23(c)(2) class notice question. Because plaintiff Schwarzschild challenged *only* the district court's order directing the distribution of class notice, there are no other issues presented in this appeal. Moreover, in refusing to permit such notice, the two-judge majority relied exclusively on petitioners' purported "waiver" – i.e., Wyse's filing (on the last possible day) of a motion for summary judgment where plaintiff Schwarzschild had failed to distribute class notice prior to that time. Thus, this case squarely presents for decision the propriety of the Ninth Circuit's "waiver" theory of class notice and the appropriate construction of Rule 23(c)(2).

Accordingly, this Court should grant review because the decision below (1) contradicts the express language of Rule 23(c)(2); (2) contravenes this Court's decision in *Eisen*; (3) creates a split among the circuits; and (4) runs contrary to the important policies served by class notice.

I. The Decision Below Directly Conflicts with the Plain Language of Rule 23

Rule 23 requires notice to the absent plaintiff class members in *every* 23(b)(3) class action case. Indeed, the language of Fed. R. Civ. P. 23(c)(2) could not be clearer:

> "In *any* class action maintained under subdivision (b)(3), *the court shall* direct to the members of the class the best notice practicable under the circumstances." (Emphasis added).

The history of the provision further corroborates its mandatory nature. In describing section (c)(2), the Advisory Committee explained that:

> "the *court is required* to direct notice to the members of the class of the right of each member to be excluded from the class upon his request."

Advisory Committee's Notes to Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 105 (1966).

Moreover, the remainder of Rule 23 makes clear that final judgment simply may not be entered in a class action case – whichever party prevails – until notice has been provided. For example, Fed. R. Civ. P. 23(c)(3) requires that:

> "The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the *notice provided in subdivision (c)(2) was directed . . .* "

(Emphasis added). *See also* Manual for Complex Litigation, Third § 30.21 (1995) ("Notice to class members is mandated . . . when a class is certified under Rule 23(b)(3).").

Despite the overwhelming clarity of the rule and its history, the opinion below effectively holds that, under some circumstances, notice to a certified class prior to final judgment simply is not required. Beginning with the unobjectionable premise that notice should generally be directed to the class as soon as possible following certification, the two-judge majority leapt to an unsupportable non sequitur: if notice is not sent prior to the district

court's entry of an order granting summary judgment for the defendant, then Rule (c)(2) simply does not apply.[7]

The Ninth Circuit further compounds this error by holding that it is *defendants'* conduct that determines whether or not notice must be sent in a particular case. But Rule 23 nowhere requires that defendants seek distribution of class notice. Instead, as the dissent correctly noted, Rule 23(c)(2) notice is a right belonging to absent plaintiff class members, and the distribution of such notice is an obligation of plaintiff class representatives. *See, e.g., Eisen*, 417 U.S. at 178-79.[8]

---

[7] As the dissent properly recognized, there is no doubt that the district court's order granting defendants' summary judgment motion in this case was *not* itself a final judgment. Thus, the class action was and continues to be "maintained" before the district court. (*See* A15). Under Fed. R. Civ. P. 58, a final judgment must be set forth in a separate document. *See United States v. Indrelunas*, 411 U.S. 216, 221-22 (1973); *Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633, 635 (5th Cir. 1981); *see also Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989) (Ninth Circuit rigorously enforces the requirement of a separate judgment). As noted above, however, the Ninth Circuit concluded that the district court's order directing distribution of notice was an appealable order. *See supra* note 4.

[8] Venturing still further afield from the language of Rule 23(c)(2), the majority below suggests in a footnote that its "waiver" doctrine may not apply (i.e., that notice may not be "waived") "in cases in which the *plaintiffs* have succeeded on summary judgment." (A13 n.4) (emphasis in original). The panel's opinion, however, provides no basis for distinguishing between cases in which defendants prevail and those in which plaintiffs prevail. Certainly, no such distinction is found in the language of Rule 23. Moreover, any such distinction would lead to anomalous results. For example, assume that two defendants

II. The Decision Below Squarely Contravenes This Court's Decision in *Eisen*

Like the text of Rule 23 itself, this Court's precedent is exceedingly clear. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974), this Court ruled that:

> "individual notice to identifiable class members is *not* a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23."

Rejecting claims that notice to a class of 2,250,000 plaintiffs would be overly expensive or ineffective, the Court explained that the purpose of Rule 23(c)(2) was "to insure that the judgement, whether favorable or not, would bind all class members who did not request exclusion from suit." *Ibid.* Thus, "quite apart from what due process may require . . . Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort." *Id.* at 177 (emphasis added). As the dissent properly recognized, this Court's decision in *Eisen* "committed itself to the view that Federal Rule of Civil

---

move for summary judgment on the same day; further assume that the first defendant obtains summary judgment, while the second defendant's motion is denied, and summary judgment is granted against the second defendant in favor of the plaintiff in the case. If, as the panel intimates, the two cases are to be treated differently under Rule 23(c)(2), the first defendant has "waived" his "right" to class notice, while the second defendant – who took *exactly* the same action as the first defendant – has not "waived" notice.

Procedure 23(c)(2) leaves 'no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.'" (A16) (citation omitted).

Nothing in *Eisen* or any of this Court's other decisions authorizes an exception to the mandatory notice rule where a district court enters an order granting a defendant's summary judgment motion.[9] *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547-48 (1974) ("Once it is determined that the action may be maintained as a class action under subdivision (b)(3), the court is mandated to direct to members of the class 'the best notice practicable under the circumstances.'") (footnote omitted). Still less do this Court's precedents authorize the creation of a "waiver" doctrine under which plaintiffs' notice is rendered contingent on defendants' decision to seek summary adjudication.

Yet, in its original opinion, the majority below did not discuss or even cite *Eisen*. After a petition for rehearing, the panel amended its opinion, but relegated *Eisen* to a footnote in which the two-judge majority perfunctorily concluded that *Eisen* "in no way affects our determination." (A11 n.2). The majority below is mistaken. *Eisen*

---

[9] The Court's reasoning in *United Airlines, Inc v. McDonald*, 432 U.S. 385 (1977) suggests that issues of class certification – and therefore necessarily also issues of class notice – may be raised and resolved even *after* the entry of final judgment. *See id.* at 391 (plaintiff was permitted to intervene after final judgment solely for the purpose of successfully appealing the denial of class certification).

requires notice in all (b)(3) class actions, and the decision below flatly contradicts this Court's governing precedent.

III. The Decision Below Creates a Conflict Among the Circuits

In manufacturing its Rule 23(c)(2) "waiver" doctrine, the majority below purports to rely on two decisions from the Third and D.C. Circuits. In particular, the opinion below states that "several circuits have concluded that a defendant waives his right to have notice sent to the class under Rule 23(c)(2) whenever he moves for summary judgment before the class has been properly certified and notified." (A13) (citing *Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980) and *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974)). However, as the dissent properly observed, "in weaving together its novel waiver theory, the court is inconsistent with the two cases as to which it says that it is in harmony." (A16).

In fact, both *Postow* and *Katz* directly contradict the majority's conclusion that a district court should not send notice to a certified class after granting a motion for summary judgment. *Postow* expressly held that a district court could order class notice (and class certification) *after* a summary judgment motion had been granted. 627 F.2d at 1383. In *Postow*, plaintiffs obtained summary judgment, and the D.C. Circuit affirmed the district court's subsequent order certifying the plaintiffs' class – an order after summary judgment was granted which necessarily required class notice. In so holding, the *Postow* court relied on this Court's decision in *United Airlines, Inc. v. McDonald*. *See supra* p. 10, n.8. Similarly, *Katz* held that

the district court can – if a defendant agrees – postpone consideration of both class certification and class notice until *after* a determination concerning liability. *See* 496 F.2d at 762. In *Katz*, the defendant corporation (unlike the Wyse defendants in this case) actively sought to avoid class notice prior to a determination on the merits. The Third Circuit approved waiting until after disposition of the case on the merits before resolving issues of class certification and notice, thereby recognizing that notice could be given after disposition on the merits. *Id.*

The majority below places great weight on the suggestion in *Postow* and *Katz* that notice may be "waived" when a district court enters a final judgment or other determination on the merits *prior to class certification*. *See Postow*, 627 F.2d at 1380-81; *Katz*, 496 F.2d at 758-62. But this argument entirely misses the point. As the dissent properly noted, "neither [*Postow* nor *Katz*] holds that by moving for summary judgment *after certification* a defendant waives the requirement of notice." (A16) (emphasis added). *Certification* is a critical step, because certification triggers the requirement of notice. Prior to certification, the obligation to send notice is far from clear, and a defendant who seeks summary judgment before certification has little basis to argue that notice is required. However, once a class is certified – as was the class in this case – Rule 23 and this Court's precedents render class notice mandatory, regardless of the defendant's decision to seek summary judgment. Thus, the comments in *Postow* and *Katz* that notice is not required when summary judgment is entered *before* certification are inapposite.

Accordingly, the decision below is alone – and in conflict with two longstanding decisions of other circuits

– in holding that a defendant "waives" the requirement of class notice by seeking and obtaining summary judgment after class certification. Because notice is a significant issue in every Rule 23(b)(3) class action, the opinion below creates a substantial conflict with other circuits on a recurring and important issue on which national uniformity is imperative.

IV. The Decision Below is Directly At Odds with the Public Policies Served By Class Notice

Not only is the Ninth Circuit's "waiver" theory precluded by the language of Rule 23, foreclosed by *Eisen*, and in conflict with the rulings of other circuits – it is also a bad idea.

1. The majority's holding below undermines the basic policy of Rule 23 itself – i.e., the policy of disposing of numerous similar claims in one lawsuit, rather than by means of piecemeal litigation. This case has been certified as a Rule 23(b)(3) class action, and the district court has made all of the necessary findings to ensure that class-wide adjudication is fair to the absent class members. However, if notice is not sent to the absent class members, they will not be bound by the district court's disposition of the case on its merits. All of the absent class members will then be free to file their own individual claims.[10] Such a proliferation of individual actions is a

---

[10] *See American Pipe & Construction Co.*, 414 U.S. at 554 ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.").

waste of scarce judicial resources and an unnecessary imposition on defendants where, as here, the district court already has determined that class action adjudication is appropriate. All that is necessary to implement Rule 23's policy of joint disposition of all class members' claims in a single proceeding is to require that class notice be sent pursuant to Fed. R. Civ. P. 23(c)(2).

2. The majority's ruling below also encourages litigants to avoid, rather than seek, early dispositions on the merits in class action cases. The "waiver" theory effectively rewards plaintiff Schwarzschild for his delay in sending out class notice. Such a reward sends a clear message to class representatives in other cases: delay distribution of class notice for as long as possible in order to prevent defendants from seeking summary judgment or other pre-trial disposition on the merits. A defendant who has a meritorious summary judgment motion but seeks to bind all class members will not, under the decision below, be able to file the motion early in the case, but will instead be forced to wait until the plaintiff sends out class notice. Indeed, if the plaintiff delays long enough – as did Schwarzschild in this case – a defendant may effectively be precluded from seeking a class-wide summary judgment at all.[11] But such a result runs directly contrary to the strong public policy in favor of encouraging early summary judgment motions against meritless claims.[12]

---

[11] Wyse's summary judgment motion was filed on the last day allowed by the district court's pre-trial scheduling order for filing dispositive motions.

[12] The reasoning of the Ninth Circuit's opinion suggests that defendants may attempt to avoid "waiver" by filing a motion to compel class notice. However, this argument stands

3. The opinion below permits precisely the type of "one-way intervention" that Rule 23(c)(2) was designed to avoid. Under the panel's ruling, absent class members will not be bound by the district court's order granting summary judgment because they have received no notice or opportunity to opt out. But if the Ninth Circuit (or this Court) ultimately reverses the district court's order granting summary judgment, plaintiff Schwarzschild already has indicated that he will seek to send notice to class members at that time. This notice would allow absent class members to take advantage of the appellate ruling in Schwarzschild's favor. Thus, if summary judgment is affirmed, class members are not bound; if it is reversed, class members may opt in and be bound. Such a lack of mutuality, however, runs directly contrary to the policies that led to the adoption of Rule 23(c)(2) in the first instance.[13]

---

the entire class notice scheme on its head. Notification of the class is the responsibility of the plaintiff, not the defendant. (A15). Under ordinary circumstances (such as those in this case), defendants should not be put to the burden and expense of forcing class notice to be sent – that is, as the dissent correctly recognized, the duty of plaintiff class representatives. (*Id.*). *See also* 2 Newberg, § 8.09, at 8-31 ("Other factors aside, *Eisen* mandates individual notice to class members at the plaintiff's expense. . . . ").

[13] *See, e.g., American Pipe and Construction Co.*, 414 U.S. at 547 ("A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. . . . The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and

4. Finally, the opinion below incorrectly asserts that notice "would serve no purpose in this case save to require the plaintiffs to engage in a costly and unnecessary exercise." (A14). Quite to the contrary, notice here will serve *precisely* the same purpose that it serves in every Rule 23(b)(3) class action: to notify absent class members that a case is being pursued on their behalf, and to give them an opportunity either to join that case or exclude themselves from it. Contrary to the panel's implicit assumption, this case is *not* over, and Schwarzschild has indicated that he will appeal. Plaintiff class members may either opt out and bring their own case, or remain with Schwarzschild on his appeal. Such notice gives class members a chance to make that decision. It is indeed anomalous that the self-proclaimed champion of the rights of the class – plaintiff Schwarzschild – should argue that it serves no purpose to notify the class of the status of the case and of their rights with respect to it. Accordingly, notice in this case – as in all similar class actions – is both appropriate and required.

---

would be bound by all subsequent orders and judgments."); *see also* Fed. R. Civ. P. 23(c)(2) (notice informs class members that, if they do not request exclusion, they will be bound by "the judgment, whether favorable or not").

CONCLUSION

For all of the foregoing reasons, certiorari should be granted.

Respectfully submitted,

STEVEN M. SCHATZ
Counsel of Record
WILSON, SONSINI, GOODRICH
& ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, California 94304
(415) 493-9300

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD T. SCHWARZSCHILD, on behalf of himself and all others similarly situated, Plaintiff, v. BERNARD K. TSE, et al., Defendants.	NO. C-90-20052-RMW(PVT) ORDER GRANTING DEFENDANTS' MOTION FOR APPROVAL OF CLASS NOTICE (Filed Jul. 7, 1993)

The court has received and considered defendants' Bernard K. Tse, Lawrence D. Lummis, Robert C. Wilson, Phillip E. White, James P. Lally and Wyse Technology, Inc.'s ("defendants") motion for approval of class notice and the opposition thereto. The motion was heard by the court on June 25, 1993. Good cause appearing therefor, the court hereby grants defendants' motion for approval of class notice, as discussed in greater detail below.

BACKGROUND

On October 24, 1991, this court certified a class in this action, pursuant to Federal Rules of Civil Procedure, Rule 23(b)(3). Defendants moved to reconsider the class certification. That motion was denied by the court on July 9, 1992.

In the fall of 1992, defendants moved for summary judgment. Defendants also moved to decertify the class. Plaintiff moved for an order approving class notice. In an order dated December 9, 1992, the court granted defendants' motion for summary judgment and declined to rule on defendants' motion for decertification, as well as plaintiff's request for approval of class notice, on the basis that those class certification issues were mooted by the granting of defendants' motion for summary judgment. Accordingly, no class notice has been sent.

Defendants now contend that notice *must* be sent to the class, pursuant to Federal Rules of Civil Procedure, Rule 23(c)(2) and the holding in *Manasen v. California Dental Services*, 638 F.2d 1152, 1154 (9th Cir. 1979). Plaintiff argues that, since no action is presently being "maintained", Rule 23(c)(2) does not apply. Plaintiff distinguishes the Ninth Circuit's holding in *Manasen* on the basis that the appellate court *reversed* the district court's order granting summary judgment, therefore, notice to the class was necessary.

DISCUSSION

Rule 23(c)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

The Notes of Advisory Committee on Rules following this rule indicate that notice pursuant to Rule 23(c)(2) "must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class". (*See*, Supplementary Note of Advisory Committee Regarding This Rule, 1966 Amendment).

In addition to both the text of Rule 23(c)(2) and the Notes following the Rule, the Ninth Circuit has held that notice to a class represented under Rule 23(b)(3) is mandatory and not discretionary under Federal Rules of Civil Procedure, Rule 23(c)(2). *Manasen v. California Dental Services*, 638 F.2d 1152, 1154 (1979). Plaintiff attempts to distinguish the Ninth Circuit's holding in *Manasen* on the basis that the Ninth Circuit reversed the district court's grant of summary judgment, thereby necessitating notice to the class since an action was pending once again. A review of the *Manasen* holding reveals, however, that the ruling was not based upon the fact that the summary judgment order was reversed since the ruling stated that the district court erred by deeming notice to the class unnecessary.

Accordingly, based upon the foregoing, the court hereby grants defendants' motion for approval of class notice. However, the proposed order approving and directing class notice and establishing class notice procedures as well as the proposed class notice submitted to the court are unacceptable. The parties are hereby ordered to meet and confer and present a proposed order and class notice to the court on or before July 23, 1993.

If, after the meet and confer, the parties are unable to agree on a proposed order and notice, then each party is to submit its own proposed order and notice to the court on or before July 23, 1993. If necessary, the court will set a hearing to determine which notice will be sent to the class, as well as which procedure will be utilized for sending such notice to the class.

The parties are hereby advised that the class notice should clearly explain the effect of the court's order granting summary judgment to the defendants. The notice should not state that the court has expressed no opinion regarding the merits of this action.

DATED: JULY 6, 1993

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

COPIES OF ORDER MAILED ON JUL 7 1993 TO:

WECHSLER, SKIRNICK, HARWOOD
HALEBIAN & FEFFER
Stuart D. Wechsler
Joel C. Feffer
555 Madison Avenue
New York, New York 10022

GEORGE C. ZACHARY, ESQ. and
ROSENFELD, MEYER & SUSMAN
JOHN J. STUMREITER
HARRIS J. KANE
9601 Wilshire Blvd., 4th Floor
Beverly Hills, CA 90210

Steven M. Schatz
Terry T. Johnson
Peter P. Chen
WILSON, SONSINI, GOODRICH
& ROSATI
Two Palo Alto Square, Suite 900
Palo Alto, CA 94306

APPENDIX B

Richard T. SCHWARZSCHILD,
Plaintiff-Appellant,

v.

Bernard K. TSE, et al.; Lawrence D. Lummis; Robert C. Wilson; Phillip E. White; James P. Lally; Wyse Technology, Inc.; WT Acquisition Corp.; and Channell International Corporation,
Defendants-Appellees.

No. 93-16681.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 13, 1995.

Decided June 22, 1995.

Amended Oct. 24, 1995.

Joel C. Feffer, Wechsler, Skirnick, Harwood, Halebian & Feffer, New York, New York, for plaintiff-appellant.

Steven Schatz, Wilson, Sonsini, Goodrich & Rosati, Palo Alto, California, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before: FLETCHER, REINHARDT, and JOHN T. NOONAN, Jr., Circuit Judges.

Opinion by Judge REINHARDT; Dissent by Judge NOONAN.

REINHARDT, Circuit Judge:

We consider here a narrow question of procedure involving notices in class action cases. We must decide

whether a defendant who has succeeded in obtaining summary judgment may subsequently compel the named plaintiff to give the class the Rule 23(c)(2) notice that is ordinarily given shortly after class certification, or whether by obtaining judgment before the notice is given the defendant has waived any right to have notice sent to the purported class members.

I.

Richard T. Schwarzschild [plaintiff] sued Bernard K. Tse, et al. [defendants], for violations of Sections 13(e) and 14(e) of the Securities and Exchange Act, as well as for violations of the California Corporations Code. Plaintiff filed his claim in January of 1990. In July of that year, he moved for class certification. The district court granted the motion to certify on October 24th, 1991 and denied the defendants' subsequent motion for reconsideration in July of 1992.

On October 9th, 1992, defendants filed a motion for summary judgment and a motion to decertify the class. On the same day, plaintiff filed a motion for an order approving class notice. On December 9th, 1992, the district court entered an order granting the defendants' motion for summary judgment and stating that the defendants' motion to decertify and the plaintiff's motion to distribute notice were moot. Almost six months after the grant of summary judgment, in May of 1993, defendants moved for an order directing the distribution of notice to the class concerning the pendency of an action.

On July 13, 1993, the district court granted the defendants' motion and ordered that notice concerning the

pendency of an action be sent to all members of the plaintiff class. Schwarzschild now appeals that order.[1] He contends that, once summary judgment has been granted upon the defendants' own motion, a district court may not require notification of the members of the class.

II.

This appeal involves the notice requirement of Federal Rule of Civil Procedure 23(c)(2), which states that:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member of the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

Fed.R.Civ.P. 23(c)(2). We review the district court's interpretation of the rule *de novo.*

Defendants maintain, and the district court agreed, that Rule 23(c)(2) compels a court to send notice concerning the pendency of the action to all members of the class even when summary judgment has already been granted

---

[1] A motions panel of this court has already ruled that the order in question is a final, appealable order.

upon the merits of the case. Plaintiff contends, in contrast, that notice is not required when a district court has already granted summary judgment in favor of the defendants upon their own motion. We agree with the plaintiff and hold that, by obtaining summary judgment before the class has been certified and notice has been sent, the defendants waived any right to compel the plaintiff to notify the class of the pending action.

III.

The unusual nature of the issue before us is due in large part to the fact that district courts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified. The purpose of Rule 23(c)(2) is to ensure that the plaintiff class receives notice of the action well *before* the merits of the case are adjudicated. *See, e.g., Postow v. OBA Fed. Sav. and Loan Ass'n*, 627 F.2d 1370, 1381-82 (D.C.Cir.1980); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 759-60 (3d Cir.1974) (en banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974); 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, Sec. 1788, at 222-23 (2d ed. 1986); *cf. Besinga v. United States*, 923 F.2d 133, 136-37 (9th Cir.1991).

As the Third Circuit has noted, the history of the development of Rule 23(c)(2) makes clear that the rule was adopted to prevent "one-way intervention" – that is, the intervention of a plaintiff in a class action after an adjudication favoring the class had taken place. Such intervention is termed "one way" because the plaintiff would not otherwise be bound by an adjudication in

favor of the defendant. *Katz*, 496 F.2d at 759. In the words of the Third Circuit:

> Many commentators objected that one-way intervention had the effect of giving collateral estoppel effect to the judgment of liability in a case where the estoppel was not mutual. This was thought to be unfair to the defendant. To meet the point that one-way intervention was unfair to the defendant, the Advisory Committee on Federal Rules concluded that class members should be brought in *prior* to the determination of defendant's liability, thus making the estoppel mutual. To make joinder at an early stage practically achievable, the "opting out" mechanism was devised.

Id. (emphasis added and internal citations omitted).

The language of Rule 23(c)(2) supports the view that notice must be sent *before* a judgment has been granted. First, it applies only to a class action "maintained" before the district court. *Fed.R.Civ.P.* 23(c)(2). Second, the rule states that the notice must advise the member that "the judgment, whether favorable or not, *will* include all members who do not request exclusion," *id.* (emphasis added). The rule thus clearly contemplates that the notice requirement will be met *before* the parties are aware of the district court's judgment on the merits.

IV.

Although the history, purpose, and language of Rule 23(c)(2) indicate that it only contemplates notification of the class *before* a final judgment has been rendered on the merits, defendants maintain that this court's per curiam

decision in *Manasen v. California Dental Services*, 638 F.2d 1152 (9th Cir.1979), compelled the district court to grant the defendants' motion to send notice to the class even after it rendered its judgment.[2] In effect, defendants urge us to extend the mandatory notice requirement of Rule 23(c)(2) to cases in which summary judgment has already been granted on the defendant's own motion. We decline to do so.

The defendants misread our holding in *Manasen*. In *Manasen*, we reversed and remanded a case in which a district court had made a summary judgment ruling that was contrary to a new Supreme Court decision. In ruling upon the plaintiffs' appeal, we also granted the defendant's cross-appeal from the district court's failure to order the plaintiffs to send notice to the class they purported to represent. *Manasen*, 638 F.2d at 1153-54. We observed when granting the defendant's cross-appeal that notice under Rule 23(c)(2) is "mandatory and not discretionary." *Id.* at 1154. The defendants here contend

---

[2] Defendants also assert that the mandatory language of rule 23(c) makes clear that the rule was intended to be applied even after a judgment on the merits has been rendered. In essence, they ask us to conclude that notice is mandatory after a judgment on the merits has been rendered merely because the rule states that notice is mandatory *before* such a judgment has been entered. However, the history and the text of the rule belie the defendants' contention that the rule was designed to be invoked after a judgment has been granted on the merits. *See supra* p. 296. Thus, the statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), that notice to class members is an unambiguous, non-discretionary requirement of Rule 23 in no way affects our determination. *Id.* at 176, 94 S.Ct. at 2152.

that the *Manasen* defendant was cross-appealing a refusal by the district court to send notice to the class after it had granted summary judgment in its favor. Accordingly, they urge us to interpret *Manasen* as holding that notice is mandatory even after summary judgment has been granted.

Manasen does not support the defendants' contention. To the contrary, once we decided to reverse the grant of summary judgment in that case and remand it to the district court, it was clear that notice would be required under Rule 23(c)(2) because the case would once again be pending before the district court. Thus, the *Manasen* defendants were entitled to have the class notices sent. Accordingly, we find that *Manasen* in no way supports the defendants' strained reading of Rule 23(c)(2).

V.

Having concluded that *Manasen* does not compel notice to be sent in this case, we now turn to the plaintiff's contention that the defendants waived their right to send notice to the class by obtaining summary judgment before notice of the pending action was sent.[3]

---

[3] Defendants contend that we may not reverse the district court's decision on this ground because the plaintiff failed to raise this argument below. The record reveals, however, that the plaintiff raised the waiver issue before the district court; he even cited the appropriate case in making his argument. Moreover, even if the plaintiff had failed to raise the issue with sufficient explicitness, we could nevertheless address it because it is a purely legal question that can be resolved without further

Although we have not explicitly ruled upon this question, several circuits have concluded that a defendant waives his right to have notice sent to the class under Rule 23(c)(2) whenever he moves for summary judgment *before* the class has been properly certified and notified. For example, the District of Columbia Circuit has stated:

> the strongest argument for [forbidding] post-judgment class certification is that pre-judgment certification and notice to the class are necessary to protect the defendant from future suits by potential members of the class. But that rationale disappears when the defendant himself moves for summary judgment before a decision on class certification. In such a situation, *"the defendants . . . assume the risk that a judgment in their favor will not protect them from subsequent suits by other potential class members, for only the slender reed of* stare decisis *stands between them and the prospective onrush of litigants."*

Postow, 627 F.2d at 1382 (quoting *Haas v. Pittsburgh Nat'l Bank*, 381 F.Supp. 801, 805 (W.D.Pa.1974), *rev'd on other grounds*, 526 F.2d 1083 (3d Cir.1975)).[4] Similarly, the Third Circuit has concluded in an en banc decision that when a defendant prefers to "take its chances on stare decisis

---

development in the factual record. *Bolker v. Commissioner of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir.1985).

[4] The District of Columbia Circuit, however, concluded that "equitable reasons" may allow post-judgment certification and notice in cases in which the *plaintiffs* have succeeded on summary judgment in certain circumstances. *Postow*, 627 F.2d at 1383. We need not address the merits of that holding here and reserve judgment on that question.

rather than res judicata," the district court may grant the defendant's motion for summary judgment even though the class has not yet been notified. *Katz*, 496 F.2d at 759.[5]

We join the District of Columbia and Third Circuits in holding that when defendants obtain summary judgment before the class has been properly certified or before notice has been sent, they effectively waive their right to have notice circulated to the class under Rule 23(c)(2); in such cases, the district court's decision binds only the named plaintiffs. The defendants' novel interpretation of Rule 23(c) ignores its purpose, development, and text. Given that notice would serve no purpose in this case save to require the plaintiffs to engage in a costly and unnecessary exercise, we decline to apply Rule 23(c)(2) in a manner that is clearly contrary to the intent of its framers.

CONCLUSION

By obtaining summary judgment before notice had been sent to the class, the defendants waived their right to have such notice given and to obtain a judgment that was binding upon the class. Accordingly, the decision of

---

[5] Underlying the holdings of the District of Columbia and Third Circuits may be the fact that several circuits have held that a decision rendered by the district court before a class has been properly certified and notified is not binding upon anyone but the named plaintiffs. *See, e.g., Besinga*, 923 F.2d at 137; *Gert v. Elgin National Industries, Incorporated*, 773 F.2d 154, 160 (7th Cir.1985); *Wright v. Collins*, 766 F.2d 841, 847 (4th Cir.1985); *Jones v. Diamond*, 594 F.2d 997, 1023 (5th Cir.1979), *rev'd on other grounds*, 636 F.2d 1364 (5th Cir.1981) (en banc), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981).

the district court is reversed and remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

NOONAN, Circuit Judge, dissenting:

The court suggests that the sole purpose of Rule 23(c)(2) is to prevent one-way intervention by plaintiffs when judgment against a defendant has been granted. The rule, however, is intended to protect the due process rights of potential class members. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74, 94 S.Ct. 2140, 2150-51, 40 L.Ed.2d 732 (1974) (citing Advisory Committee's Note to Rule 23). The opinion's "waiver" rationale is puzzling in this context. The reasoning is based on the notion that a defendant has a right to send class notice. Rule 23(c)(2), however, gives potential class members a right to receive individual notice upon the court's direction. Correlative to this right is a duty imposed on the class representative to send the class the appropriate notice. The opinion transforms this duty to the class into a right of the defendant to have such notice sent. This view is unsupported by Rule 23(c)(2), which imposes a requirement of notice to the class members but does not mention any right of the opposing party to have notice sent.

The court, however, goes on to suggest that the language of Rule 23(c)(2) supports its view because the rule only applies to a class action "maintained" before the district court. In the instant case, no final judgment has been entered by the district court. The case is therefore still being maintained. Moreover, contrary to the majority's suggestion, the district court's order of class notice can still properly satisfy the requirements of Rule

23(c)(2)(B) to inform potential class members that "the judgment, whether favorable or not, will include all members who do not request exclusion." Fed.R.Civ.P. 23(c)(2).

In weaving together its novel waiver theory, the court is inconsistent with the two cases as to which it says that it is in harmony. *Postow v. OBA Fed. Sav. and Loan Ass'n*, 627 F.2d 1370 (D.C.Cir.1980); *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.1974) (en banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974). In *Postow* the district court certified the class after summary judgment, with the implication that members of the class be notified; the order was affirmed by the circuit. *Postow*, 627 F.2d at 1383. In *Katz* the defendant was permitted to wait until after disposition of the case on the merits before class notice was sent. *Katz*, 496 F.2d at 762. Dicta in both cases do refer to the possibility of waiver of notice by the defendant prior to class certification. But neither case holds that by moving for summary judgment after certification a defendant waives the requirement of notice.

In *Eisen*, 417 U.S. at 175, 94 S.Ct. at 2151, the Supreme Court committed itself to the view that Federal Rule of Civil Procedure 23(c)(2) leaves "no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort" even though in the case before the court there were 2,250,000 identifiable members. Against all practical objections raised the Supreme Court held: "The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." *Id.* at 176, 94 S.Ct. at 2152. Despite the

attractive policy arguments presented in the majority opinion, we are bound by this opinion.

I respectfully dissent.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD T. SCHWARZSCHILD, Plaintiff-Appellant v. BERNARD K. TSE, et al.; LAWRENCE D. LUMMIS, ROBERT C. WILSON, PHILLIP E. WHITE, JAMES P. LALLY, WYSE TECHNOLOGY, INC., WT ACQUISITION CORP., AND CHANNELL INTERNATIONAL CORPORATION, Defendants-Appellees.	No. 93-16681 D.C. No. CV-90-20052-RMW ORDER (Filed Nov. 20, 1995)

Before: FLETCHER, REINHARDT, and NOONAN, Circuit Judges.

Judges Fletcher and Reinhardt have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Noonan has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or

not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to

come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX E

WECHSLER SKIRNICK HARWOOD
HALEBIAN & FEFFER
STUART D. WECHSLER
JOEL C. FEFFER
555 Madison Avenue
New York, New York 10022
(212) 935-7400

GEORGE C. ZACHARY, ESQ.
and
ROSENFELD, MEYER & SUSMAN
JOHN J. STUMREITER
HARRIS J. KANE
9601 Wilshire Boulevard, 4th Floor
Beverly Hills, California 90210
(213) 858-7700

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICHARD T. SCHWARZSCHILD, on his own behalf and on behalf of all persons similarly situated, Plaintiff, v. BERNARD K. TSE, LAWRENCE D. LUMMIS, ROBERT C. WILSON, PHILLIP E. WHITE, JAMES	No. C 90-20052-RMW CLASS ACTION ~~[PLAINTIFF'S PROPOSED]~~ ORDER APPROVING AND DIRECTING CLASS NOTICE AND ESTABLISHING CLASS NOTICE PROCEDURES (Filed Aug. 6, 1993)

P. LALLY, WYSE TECHNOLOGY INC., WT ACQUISITION CORP., and CHANNEL INTERNATIONAL CORPORATION,

Defendants.

WHEREAS, on October 24, 1991, this Court determined that this action should proceed as a plaintiff class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and certified a plaintiff class represented by plaintiff Richard I. [sic] Schwarzschild consisting of all persons, except defendants and their affiliates, who were solicited to tender their shares of Wyse Technology Inc. ("Wyse") pursuant to WT Acquisition's offer to purchase dated December 14, 1989, and Wyse's Schedule 14D-9, which determination this Court refused to reconsider by Order entered June 9, 1992; and

WHEREAS, on December 9, 1992, this Court made an order granting the Wyse Defendants' motion for summary judgment; and

WHEREAS, this Court has determined that the class previously certified must now be provided notice of the pendency of the case and of this Court's order granting summary judgment,

NOW THEREFORE, it is hereby ordered and directed that the procedure for the mailing of class notice and establishing the class be as follows:

1. The form of class notice ("the Notice") attached hereto as Exhibit 1, and the procedures for giving notice

as set forth herein comply with the requirements of due process and Rule 23(c)(2) of the Federal Rules of Civil Procedure and are approved by the Court.

2. Plaintiff, at his expense, will send the Notice through the United States mails by first-class mail to all registered holders. Defendants are ordered to produce to plaintiff's counsel as soon as practicable a list of all persons to whom the Offer to Purchase and Schedule 14D-9 were mailed or otherwise delivered. Plaintiff is ordered to mail the Notice to such persons within 20 days after receipt of such list. The last date for mailing a request for exclusion from the class is 30 days after mailing of the Notice. After the mailing of the Notice, plaintiff is directed to file with the Court, and serve upon the parties herein, a declaration of that mailing attaching thereto a list of the names and addresses to whom the Notice was mailed. Plaintiff shall serve all requests for exclusion on counsel for the defendants.

3. Plaintiff will, at his expense, provide a post office box in the name of "Wyse Technology Inc. Securities Litigation," the number of which will be inserted in the Notice for receipt of class member communications.

4. With respect to class members who held Wyse Technology Inc. shares in nominee name, the Notice requests nominees who held shares for the beneficial interest of others to promptly (1) provide a list of names and addresses of the beneficial holders of such shares to a litigation administrator selected by plaintiff's counsel, which may be plaintiff's counsel (the "Administrator"), or (2) forward a copy of the Notice to each such beneficial purchaser and provide the Administrator with written confirmation that the Notice has been so forwarded. The

Administrator will mail the Notice to each beneficial holder identified by a nominee within five days of receipt of the name and address of the beneficial holder. Upon request, the Administrator will send additional copies of the Notice to nominees for forwarding to beneficial holders. The Administrator will maintain a list of all nominees who request copies of the Notice for mailing to beneficial holders.

5. As soon as practicable following completion of mailing to all persons identified as beneficial holders by nominees, plaintiff's counsel will file with the Court, and serve upon the parties herein, a declaration of that mailing attaching thereto a list of the names and addresses to whom that Notice was mailed. Plaintiff's counsel and the Administrator will retain all correspondence to and from nominees and will provide defendants with access to and copies of that correspondence.

6. The proposed Notice to be mailed, attached as Exhibit 1, and the procedures for giving notice as set forth herein, comply with due process and with Federal Rules of Civil Procedure, Rule 23(c)(2), and constitute the best notice practicable under the circumstances of this case.

DATED: 8/6/93

IT IS SO ORDERED:

/s/ Ronald M. Whyte
HONORABLE
RONALD M. WHYTE
UNITED STATES
DISTRICT JUDGE

WECHSLER SKIRNICK HARWOOD
HALEBIAN & FEFFER
STUART D. WECHSLER
JOEL C. FEFFER
555 Madison Avenue
New York, New York 10022
(212) 935-7400

GEORGE C. ZACHARY, ESQ.
and
ROSENFELD, MEYER & SUSMAN
JOHN J. STUMREITER
HARRIS J. KANE
9601 Wilshire Boulevard, 4th Floor
Beverly Hills, California 90210
(213) 858-7700

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICHARD T. SCHWARZSCHILD, on his own behalf and on behalf of all persons similarly situated, Plaintiff, v. BERNARD K. TSE, LAWRENCE D. LUMMIS, ROBERT C. WILSON, PHILLIP E. WHITE, JAMES	No. C 90-20052-RMW CLASS ACTION [~~PLAINTIFF'S PROPOSED~~] NOTICE TO CLASS

P. LALLY, WYSE TECHNOLOGY INC., WT ACQUISITION CORP., and CHANNEL INTERNATIONAL CORPORATION,

Defendants.

EXHIBIT 1

NOTICE TO: ALL PERSONS WHO WERE SOLICITED TO TENDER THEIR SHARES OF WYSE TECHNOLOGY INC. ("WYSE") PURSUANT TO WT ACQUISITION'S OFFER TO PURCHASE DATED DECEMBER 14, 1989, AND WYSE'S SCHEDULE 14D-9

PLEASE READ THIS NOTICE CAREFULLY AS IT WILL AFFECT YOUR LEGAL RIGHTS

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and pursuant to an Order of the United States District Court for the Northern District of California, you are hereby notified as follows:

THE PARTIES AND THE NATURE OF THE LAWSUIT

1. The above-captioned lawsuit is now pending in the United States District Court for the Northern District of California (the "Court"). The lawsuit seeks money damages allegedly suffered by stockholders of Wyse Technology Inc. ("Wyse") as a result of the acquisition of Wyse by Channel International Corporation ("Channel"). Named as defendants are Wyse, Channel; WT Acquisition

Corp., a wholly-owned subsidiary of Channel; and Bernard K. Tse, Lawrence D. Lummis, Robert C. Wilson, Phillip E. White, and James P. Lally, all former directors of Wyse. As described in more detail below, by order dated December 9, 1992, the Court granted a motion for summary judgment brought by Wyse and its former directors Tse, Lummis, Wilson, White and Lally (collectively the "Wyse Defendants").

2. Plaintiff Richard I. [sic] Schwarzschild alleges that the defendants violated Sections 13(e) and 14(e) of the Securities Exchange Act of 1934, as amended, and California law, by making material misrepresentations in documents first disseminated in December 1989 during the course of Channel's acquisition of Wyse. Channel has not appeared in the lawsuit and contends that it was never served with the complaint and summons. Channel also contends that, as a Republic of China (Taiwan) corporation, the Court in any event lacks jurisdiction over it. In 1990, WT Acquisition Corp. was merged into Wyse. WT Acquisition Corp. has not appeared in the lawsuit. The Wyse defendants appeared and denied that they committed any violation of Federal or California law and asserted other defenses in connection with the lawsuit.

3. By order dated December 9, 1992, the Court granted the Wyse Defendants' motion for summary judgment. The Court considered the evidence presented by the Wyse Defendants and by plaintiff and ruled that, as a matter of law, there were no triable issues of material fact as to any of the plaintiff's claims and that therefore the Wyse Defendants were entitled to a judgment in their favor and dismissing all of plaintiff's claims against them. That judgment will be entered shortly and will end

the lawsuit as to the Wyse Defendants unless plaintiff elects to file an appeal from that judgment.

4. If you wish to be included in the class lawsuit, *you do not need to take any action.* As a class member, the judgment in this action will apply to your claims and be binding upon you and the defendants. You may, if you desire, enter an appearance in this lawsuit through your own counsel, at your own expense. The Court will exclude you from this lawsuit if you so request in the manner specified below.

5. For more detailed information concerning the matters involved in this lawsuit, you should refer to the pleadings and to the other papers filed in this lawsuit, which may be inspected at the Office of the Clerk of the United States District Court of the Northern District of California, United States Courthouse, 280 South First Street, San Jose, California 95113.

NOTICE OF CLASS ACTION DETERMINATION AND RIGHTS OF CLASS MEMBERS

6. By Orders entered October 24, 1991 and July 9, 1992, the Court determined that this lawsuit may be maintained as a class action, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of

> all persons, except defendants and their affiliates, who were solicited to tender their shares of Wyse Technology Inc. pursuant to WT Acquisition's Offer to Purchase dated December 14, 1989, and Wyse's Schedule 14D-9.

7. If you were solicited to tender your Wyse shares at any time beginning on or about December 14, 1989,

pursuant to WT Acquisition's Offer to Purchase dated December 14, 1989 and Wyse's Schedule 14D-9, you will be deemed to be member of the class unless you request to be excluded. You may request that the Court exclude you from the class. To do so, you must request exclusion from the class in writing, in a letter or postcard postmarked no later than _____, 1993. You must also set forth the name of the case, "*Schwarzschild v. Tse et al.*, Case No. C-90-20052-RMW," your name, address, and telephone number, the number of shares of Wyse which you held beginning on or about December 14, 1989, and the date(s) those shares were tendered, sold, or converted into the right to receive cash. The letter or postcard requesting exclusion should be addressed as follows:

Wyse Technology Inc.
Securities Litigation
P.O. Box ___
New York, New York ___

If you request exclusion, you will not be bound by the summary judgment order of December 9, 1992, or any subsequent decisions of this Court or any appellate court; nor will you share in the benefits, if any, from any such subsequent decisions. If you request exclusion, you may pursue any legal rights you may have, but at your own expense.

8. Should you wish to be included in the class and wish to be bound by the summary judgment order of December 9, 1992, and any further proceedings including appeal therefrom, there is no need for you to take any action at this time and you will continue to be represented by plaintiff and his counsel on any appeal and will be bound by the outcome of the judgment rendered in

this lawsuit. You may, if you so desire, enter an appearance through legal counsel of your choice.

FEES AND COSTS

9. Whether or not you elect to remain in the class, you will *not* have to advance any attorneys' fees or other costs of litigation. If you remain in the class, and if plaintiff successfully appeals this Court's judgment and by further litigation or otherwise obtains a monetary recovery, plaintiff's attorneys will apply to the Court for reimbursement of costs and for a fee, which may be based upon a percentage of the amount of the judgment or settlement (if any) and will be deducted from any judgment or settlement rendered before your pro rata share of the judgment or settlement (if any) is determined.

10. If there is a recovery, you may be required to establish your membership in the class and the amount of your damages as the Court may direct.

NOTICE TO BANKS, BROKERS OR OTHER NOMINEES

11. Banks, brokerage firms, institutions, and other nominees who hold shares of Wyse for the beneficial interest of other persons commencing on or about December 14, 1989, are requested within 10 days of receipt of this Notice to: (1) provide the Wyse Litigation Administrator (the "Administrator"), Wyse Technology Inc. Securities Litigation, P. O. Box ___, New York, New York ___, with a list of names and addresses of all such beneficial owners; or (2) forward a copy of this Notice to each such beneficial owner and provide the Administrator with

written confirmation that the Notice has been so forwarded. Upon request to the Administrator, additional copies of this Notice with postage prepaid will be provided for the purpose of mailing to beneficial owners.

FURTHER INQUIRIES

12. All inquiries (other than requests for exclusion from the class and requests for copies of the Notice) regarding the action should be addressed, in writing, to the attorneys for plaintiff in the action, at the following address:

Joel C. Feffer
Wechsler Skirnick Harwood
Halebian & Feffer
555 Madison Avenue
New York, New York 10022

or

John J. Stumreiter
Rosenfeld, Meyer & Susman
9601 Wilshire Boulevard
Beverly Hills, California 90210

DATED: ___, 1993
San Jose, California

BY ORDER OF

The Honorable Ronald M. Whyte
District Judge, United States
District Court for the Northern District
of California

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD T. SCHWARZCHILD, Plaintiff-Appellant, vs. BERNARD K. TSE, et al., Defendants-Appellees.	No. 93-16535 DC# CV-90-20052-RMW Northern California (San Jose)
RICHARD T. SCHWARZCHILD, Plaintiff-Appellant, vs. BERNARD K. TSE, et al, Defendants-Appellees.	No. 93-16681 DC# CV-90-20052-RMW Northern California (San Jose) ORDER (Filed Oct. 15, 1993)

Before: BEEZER, KOZINSKI and KLEINFELD, Circuit Judges

Appellees have moved to dismiss appeal no. 93-16535 for lack of jurisdiction. Because the order appealed from in docket no. 93-16535 was not a final appealable order, the motion to dismiss appeal no. 93-16535 is granted. *See* 28 U.S.C. § 1291.

Appellees have also moved to dismiss appeal no. 93-16681 for lack of jurisdiction. Because the order appealed from in docket no. 93-16681 is a final appealable order, the motion to dismiss appeal no. 93-16681 is denied. *See In re Victor Technologies Securities Litigation,*

792 F.2d 862 (9th Cir. 1986) (order requiring plaintiffs to reimburse third parties for costs of providing notice of class action is appealable); *see also Munoz v. Small Business Administration,* 644 F.2d 1361 (9th Cir. 1981) (appeal from final judgment calls into question all earlier rulings that produced the judgment). The briefing schedule established in docket no. 93-16681 shall remain in effect.